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No. 86-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CITY OF BIRMINGHAM,
Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION
and MICKI LEVIN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The Christian Legal Society is a non-profit Christian professional association, founded in 1961, with a present membership of 3,500 judges, attorneys, law professors, and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.1.

SUMMARY OF ARGUMENT

The petition in No. 86-389, *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), presents a straightforward question of the application of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Court of Appeals has unconvincingly distinguished *Lynch* in such a manner as to suggest that the legal rationale of the *Lynch* holding is inapplicable beyond the particular facts of that case. *Amici* support the granting of a writ of certiorari to review the judgment below on the grounds that it is contrary to *Lynch* and, perhaps more importantly, that it is representative of a disturbing trend among lower courts to refuse to follow this Court's opinion in *Lynch* in closely analogous situations.

In addition, *amici* wish to note for the Court similarities and differences between the issues in this case and the issues present in several other petitions for certiorari now before this Court, as the relationships among these cases may be important in determining whether or not to grant the writ in No. 86-389. Specifically, the genre of cases typified by this lawsuit—Establishment Clause challenges to symbolic or ceremonial references to religion—share frequently latent (and occasionally obvious) problems of justiciability not considered in *Lynch v. Donnelly*. The jurisdictional question of standing to raise such attacks on government actions under the Establishment Clause is a recurring and unsettled one, the resolution of which could have lasting impact on the growing use of federal courts as a forum to air grievances about state symbolic or traditional uses of religion via lawsuits brought by persons who have suffered no cognizable injury as a result of such practices.

ARGUMENT

THE DECISION BELOW IS CONTRARY TO *LYNCH v. DONNELLY*, 465 U.S. 668 (1984), AND SYMPTOMATIC OF A TREND AMONG LOWER COURTS TO READ *LYNCH* AS LIMITED TO ITS FACTS.

1. The facts of the instant case are nearly identical to those presented in *Lynch*: A municipality has erected and maintained a nativity scene during the Christmas holiday season. While the majority below and the plaintiffs' complaint referred to the creche as "unadorned", the dissent below accurately notes the presence of a light display, and a Christmas tree in the backdrop of the creche (Pet. App. at A21, n.4 (Nelson, J., dissenting)), and chides the majority for creating a "St. Nicholas, too" test as the *sole* basis for distinguishing this Court's holding in *Lynch*. *Id.* at A18. (Nelson, J., dissenting).[1]

The panel majority's proffered distinction based upon minor factual differences is wholly unpersuasive. The distinction rests on the notion that the outcome of *Lynch* somehow turned on the "neutralization" of the religious content of the creche by virtue of the particularly cluttered, secular physical environs in which it stood—a display including plastic elves, a sleigh, reindeer and bells. However, this characterization of the holding was emphatically rejected by the *Lynch* majority. 465 U.S. at 685 n.12. The context in which the creche was to be considered for Establishment Clause purposes was not the context of the display but the setting of the creche in the context of the Christmas holiday season. *Id.* at 679; *id.* at 680; *id.* at 685.

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[1] Another possible factual distinction, not relied upon by the majority below, is the fact that the *Birmingham* creche was on public property, while the *Lynch* creche was on private property but maintained at public expense.

Nonetheless, with a few notable exceptions[2], it has been the above mischaracterization of the holding of *Lynch* which has misled lower courts in their treatment of this recurrent issue. Were the Court of Appeals' holding in *Birmingham* an isolated occurrence, it might be thought aberrational and review by this Court would be unnecessary so soon after *Lynch*. Regrettably, however, the decision below exemplifies a trend among lower courts, which have read *Lynch* in an unduly narrow fashion, refusing to follow it outside of its own facts. *See, e.g., City of St. Charles v. American Civil Liberties Union*, 794 F.2d 265 (7th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3175, No. 86-351; *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn. 1986) (enjoining inclusion of cross in municipal Christmas display).

This case presents no occasion for an extensive discussion of Establishment Clause case law or doctrine. The relevant considerations were evaluated at length in *Lynch*. But it is necessary to make clear to local officials, generally anxious to avoid expensive litigation over such matters, that this Court has not adopted a "St. Nicholas, too" test for the constitutionality of municipal Christmas displays that include a nativity scene. The issues involved are so clearly settled, and the decision below so clearly contrary to those principles, that this case may be an appropriate candidate for granting the writ and

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[2] *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 472 U.S. ——, 105 S.Ct. 1859 (1985). *Cf. Conrad v. City and County of Denver*, —— P.2d —— (Colo.), Slip op. No. 84SA313 (September 8, 1986) (finding *Lynch* persuasive, Colorado Supreme Court finds that municipal creche does not violate state constitution). There is no necessary "conflict" among lower courts within the meaning of this Court's Rules 17.1(a) and (c), as the resolution of *McCreary* turned primarily on a "public forum" question and *Conrad* decided only a question of state constitutional law. Nonetheless, it is clear that the lower courts have not been uniform in their treatment of the meaning and scope of the *Lynch* decision.

summarily reversing the judgment below as being contrary to *Lynch*. Alternatively, the writ should be granted and the case set for full briefing and argument.

2. We note that another petition, No. 86-351, *City of St. Charles v. American Civil Liberties Union*, presenting similar issues in a slightly different factual context—the inclusion of a lighted cross as part of a municipal Christmas display—is also before this Court. We suggest that if the writ is granted in the *Birmingham* case, it should be granted in the *St. Charles* case as well, with the two cases set for joint argument. Were review granted only in *Birmingham* (and the judgment below ultimately reversed), the unintended impression might be conveyed of a "creche-cross" bright line distinction. This is not to say that the two cases might not be capable of different dispositions, but only to say that such different outcomes ought not be produced *sub silentio* through the discretionary review process.

We suggest further that, should this Court grant the writ in either or both cases, the parties be directed to brief the threshold jurisdictional issues of standing to sue. This question is especially problematic in the *St. Charles* case and should not go unnoticed simply because it is not raised in the petition.

Indeed, the jurisdictional question—explicit in *St. Charles* and implied in *Birmingham*—may well be of greater ongoing importance to the conduct of litigation in this area than would a decision on the merits of either case. Lower federal court decisions already reflect a good deal of confusion in this area, recognizing standing on exceptional and peculiar grounds in Establishment Clause cases. *See ARM v. Baker*, 80 Civ. 5590 (S.D.N.Y. 1986), *petition for certiorari denied*, 55 U.S.L.W. 3235 (U.S. October 6, 1986) (No. 86-157) (recognizing special "Establishment Clause standing" to sue the government to compel it to take certain policy action against a religious group); *Hawley v. City of Cleveland*, 773 F.2d 736

(6th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986) (standing to challenge privately-run chapel in rented space at airport based on abridgement of use and enjoyment of airport terminal and avoidance of unwelcome religious practices); *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1102-09 (11th Cir. 1983).

The "sense" which the Seventh Circuit's opinion in *St. Charles* endeavors to make of this trend is plainly inconsistent with this Court's holding in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). Judge Posner's opinion for the Seventh Circuit devotes several pages to its conclusion that at least one of the plaintiffs had standing to sue based on her decision to drive a different route at night to avoid seeing the cross. Judge Posner reasons that were such an injury, "tenuous though it be," insufficient to confer standing, many Establishment Clause disputes would be nonjusticiable, since "no one would have standing." No. 86-351, App. at 4a-5a. Recognizing that not all alleged constitutional violations are justiciable, Judge Posner asserts that this Court's cases recognize what amounts to an exception to traditional Article III standing requirements in Establishment Clause cases.

The mischief such a view can work in church-state litigation is manifest. Establishment Clause cases become not vehicles for vindication of individual rights of religious freedom from the coercive pressures of the majority but special platforms from which to complain about government actions with which one disagrees. Such suits degrade the lofty purposes of the Establishment Clause. While these disputes often generate considerable acrimony within their communities, the acrimony seems less related to a concern on the part of either side about their *religious liberty*, but more about

the insistence of the other side on having its own way.[3] Those bringing suit resent the choice of the community (usually arrived at quite informally); the community takes offense at litigation by persons whose chief complaint is that the display offends their sense of the proper separation of church and state. *Cf., Valley Forge*, 454 U.S. at 482-87. Perhaps the intolerance and stubbornness of each side is rightly condemned by the other. But the intensity of emotions on both sides does not itself generate a dispute of constitutional dimension.

It is because of the acrimony that such suits arouse and the extraordinarily sensitive nature of the issues involved that it is essential that such suits be brought by a proper plaintiff. The issues would then be properly framed to address a genuine question of deprivation of religious liberty, not an academically interesting question of whether some government act is *ultra vires.*

Several points need to be clarified in this regard. First, there is no general "Establishment Clause exception" to the fundamental requirements of Article III standing, and, in light of *Valley Forge*, the dictum in *School District of Abington v. Schempp*, 374 U.S. 203 (1963), cannot be read to have created one. Second, the "injury" that results from a violation of the Establishment Clause is an infringement to a species of *religious liberty*—a burden on the right of persons to exercise the religion of their choice or none at all, or the communication by the state of a message of disapproval of that

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[3] As a Denver newspaper editorial described it, commenting on the final resolution of the *Conrad* case, "[t]he lawsuit challenging the nativity scene was actually more divisive than the religious display itself. Yet this is typical of such lawsuits. They represent a streak of unreasonableness among a very few people who seek to cleanse every last speck of religious connotation from the public domain." Rocky Mountain News, Thursday, September 11, 1986, p. 66 col. 3. *See also Lynch*, 465 U.S. at 684.

choice.[4] Third, in certain circumstances third parties may assert this religious liberty interest of others in conjunction with some other "actual injury" to themselves, but only in those limited circumstances when third-party standing is recognized generally, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *cf. Flast v. Cohen*, 392 U.S. 83 (1968),[5] such circumstances *not* including those where the asserted third-party injury is simply some restatement of the psychic injury suffered by seeing supposed violations of the religious liberty of others, rejected in *Valley Forge*.

The record in *St. Charles* obviously presents the justiciability problem in sharper relief than does the *Birmingham* record. Nonetheless, the issue is presented by both cases in that each plaintiff alleges not a violation of his or her own religious liberty through government coercion or discrimination but only his or her subjective belief that the display in question violates the Establishment Clause. The issue whether such claims are justiciable under *Valley Forge* is worthy of this Court's review.

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[4] *See Wallace v. Jaffree*, 105 S.Ct. 2479, 2497 (1985) (O'Connor, J., concurring in the judgment) (government "endorsement" of a particular religious practice "infringes the religious liberty of the non-adherent" through indirect coercive pressure upon religious minorities to conform).

[5] The holding in *Flast* can be viewed in terms of third-party standing. Taxpayer standing was recognized for certain kinds of Establishment Clause cases on the premise (somewhat tenuous, we believe) that a taxpayer suffers redressable injury by virtue of infringement of *someone else's* religious freedom, and that taxpayers are appropriate parties to assert the rights of such persons. Taxpayer standing was unavailable to plaintiffs in *St. Charles*, as no government funds were alleged to have supported the cross-shaped lighting display. No. 86-351. Pet. App. at 3a.

These issues are implicated in yet another petition before the Court. *American Baptist Churches v. Reagan*, 786 F.2d 194 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3094 (U.S. July 24, 1986) (No. 86-113)).

CONCLUSION

For these reasons, *amici* urge this Court to consider the petition for certiorari in No. 86-389 together with the petition in No. 86-351, grant the writ in both cases, and direct the parties to brief and argue both the jurisdictional and substantive questions in each case.

Respectfully submitted,

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